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No. 00-

IN THE

# Supreme Court of the United States

EDUARDO RANGEL VELAZQUEZ
and IVAN FARON VELAZQUEZ,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether the Excessive Fines Clause of the Eighth Amendment to the United States Constitution is violated by the forfeiture of $189,825 when there is no nexus between the forfeited currency and the commission of any particularized public offense thus preventing the "proportionality" analysis required by *United States v. Bajakajian,* 524 U.S. 321 (1998).

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution is violated when property is forfeited as "proceeds" of a drug transaction and there is no nexus between the forfeited property and the commission of any particularized public offense.

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The Petitioners respectfully petition for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in this case.

## OPINIONS BELOW

The Tenth Circuit opinion (App. A) is an unreported decision of the United States Court of Appeals for the Tenth Circuit. The District Court opinion (App. B) is reported at 8 F. Supp. 2d 1300 (N.D. Okla. 1998).

## STATEMENT OF JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on June 30, 2000 and is final. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Fifth and Eighth Amendments to the United States Constitution.

In material part, the Fifth Amendment to the Constitution states as follows:

> No person shall be held . . . nor be deprived of life, liberty or property, without due process of law;

In material part, the Eighth Amendment to the Constitution states as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## STATEMENT OF THE CASE

On May 3, 1996, following a routine traffic stop for improper lane change, the Oklahoma Highway Patrol arrested the petitioners, seized their vehicle, moved it to another location miles away. Hours later, police officers conducted a warrantless search of the vehicle in which they partially disassembled the vehicle, removed the gas tank and discovered $189,825 in United States Currency which they seized from the petitioners. After the seizure, the United States of America filed a forfeiture proceeding in which it alleged that the subject currency was forfeitable for a variety of legal reasons. The forfeiture complaint contained no particularized description of any offenses committed by the petitioners and alleged no facts supporting the government's contention that the subject currency constituted the proceeds of a drug transaction.

As the factual basis for the forfeiture, the government relied exclusively on the fact that the petitioners were Mexicans, that they and/or their vehicle fit a chameleon-like drug courier profile and that the money was found in the gas tank of the vehicle used to transport it. Thereafter, the district court found probable cause to forfeit the currency on a single ground that the currency constituted the "proceeds" of an unlawful drug transaction in spite of the fact that there was absolutely no evidence of any drug transaction and in spite of the fact that there was no evidence of how the currency constituted "proceeds" of a drug transaction.

The district court's finding of probable cause cast the burden of proof on the petitioners to demonstrate that the currency was not the proceeds of a drug transaction. The petitioners requested and received a jury trial at which the

jury concluded that the petitioners had not met their burden of proof thus rendering a verdict against the petitioners and in favor of the United States of America. Judgment was entered on the jury verdict by the district court and an unsuccessful appeal was initiated to the United States District Court of Appeals for the Tenth Circuit.

**A. The Effect of the Law as Applied by the Lower Courts**

In spite of the fact that the government forfeited the seized currency taken from the petitioners as the "proceeds" of a drug crime, the petitioners in this case have never been charged with the commission of any public offense in either a state or federal court. The reason for this anomaly is simple. There is no evidence that either of the petitioners or any persons associated with the petitioners have ever committed a drug offense. Yet, in spite of this, the government seized and forfeited $189,825 of currency belonging to the petitioners.

The means by which the government was able to do so occurred by piling one impermissible inference on another from the circumstances of the seizure. More particularly, the government contended and the lower courts apparently agreed: (1) that the mere possession of $189,825.00 in currency was evidence of a drug crime; (2) that concealment of the currency was evidence of a drug crime; (3) that the petitioners occupancy of a Dodge Ram pickup was evidence of a drug crime; (4) that the petitioners mere presence on an Interstate highway during the morning rush hour traffic was evidence of a drug crime; and (5) that the petitioners' nationality (Mexican) combined with their presence in an interior state (Oklahoma) was evidence of a drug crime.

What is particularly noteworthy about the circumstances of the seizure and the forfeiture is that, despite repeated requests from the petitioners, the government could not particularize what crime was committed by the petitioners or any other persons who caused the seized currency to be proceeds of the crime. The government could not particularize when the crime occurred, where the crime occurred, what drug was involved, the quantity of the drug involved, who committed the alleged crime or whether the currency was the proceeds of a single crime or several distinct crimes. In other words, the currency was forfeited on mere conjecture about the fact and the nature of the alleged crime that allegedly produced the forfeited currency as its proceeds.

Because of the lack of particularization by the government about the alleged offense or offenses, the petitioners were affirmatively required to prove a negative proposition, that is, the non-existence of a multitude of crimes over an extended period of time, the lack of any nexus between the currency and the non-existent crimes and the petitioners' non-participation in the non-existent crimes.

This burden of proof should be contrasted with the substantially lesser burden of proof that is required in a forfeiture case when the currency is alleged to be the proceeds of a specific crime. In that case, the claimants to property need only negate the specific allegations made as to the crime alleged, their participation in it or the nexus of the forfeited property to the specifically alleged crime. In this case, however, the petitioners were unable to disprove the existence of a specific crime because no specific crime was even alleged to have been committed.

Because of the foregoing, it is the petitioner's position that a general allegation that property to be forfeited constitutes the proceeds of an unspecified crime is insufficient notice of the facts giving rise to the forfeiture. Further, it is the petitioner's position that any punitive forfeiture of property based on the property's relationship to a crime requires a particularized notice of the crime that gives rise to the forfeiture. Anything less does not provide the claimant "meaningful" notice as is required by the Due Process requirements of the Fifth Amendment to the Constitution.

An additional effect of the lower court's rulings is the total inability of a reviewing court such as this court to engage in a meaningful Excessive Fines analysis under the Eighth Amendment. As a general matter, a penalty in the nature of a fine is excessive if it is disproportionate to the offense committed. The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality. The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. *See United States v. Bajakajian,* 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998).

Until 1998, this court had never articulated a standard for determining whether a punitive forfeiture is constitutionally excessive. In *Bajakajian,* however, the court formulated a test that requires finding a forfeiture to be unconstitutionally excessive when it is "grossly disproportionate to the gravity of a defendant's offense." *United States v. Bajakajian,* 524 U.S. at 334, 118 S. Ct. at 2037.

Admittedly, a forfeiture of drug proceeds in never disproportionate and is never an excessive fine under an Eighth Amendment analysis. Nonetheless, in this case, an Eighth Amendment analysis cannot even be performed because of the fact that there is no crime that is alleged to have occurred. Consequently, it has never been possible for a reviewing court and it is not now possible for this court to determine whether the amount of the forfeiture in this case is disproportionate to the gravity of the offense that allegedly produced the forfeited currency.

By way of illustration, all would agree that if the petitioners had won $189,800 gambling or earned that amount of money from some other source and had made $25 from the sale of a minute quantity of drugs, the mere co-mingling of the money would not make the entire amount forfeitable and that the forfeiture of $189,800 because of an insignificant drug violation would constitute an excessive fine. Yet in this case, it is impossible to determine what the proceeds of the alleged drug crime are because no particular drug crime has been alleged.

In this case, the only offense that has been alleged and proven to have been committed is the traffic violation for improper lane change. Although the district court and the court of appeals have rejected the notion that the subject currency was forfeited for an improper lane change, both have failed to identify or to particularize the offense that gave rise to the forfeiture. Without this particularization, the Excessive Fines Clause of the Eighth Amendment is emasculated because it is, quite literally, impossible to apply an excessive fines analysis.

Therefore, it is the petitioners' position that the Excessive Fines Clause of the Eighth Amendment is violated when a reviewing court is unable to determine the relationship of the forfeited property to a specific criminal offense or when a reviewing court is unable to determine whether the forfeiture is "grossly disproportionate" to culpability for a specific criminal offense.

**B. Proceedings Below**

The petitioners are the claimants to the currency that was seized by the Oklahoma Highway Patrol. The respondent is the United States of America inasmuch as the United States initiated the subject forfeiture proceeding and is presently in possession of the currency.

After the United States filed a forfeiture complaint, the district court conducted a non-jury hearing to determine whether probable cause existed to believe that the currency was forfeitable. Although no evidence of any particularized criminal offense was presented, the court determined that the suspicious circumstances of two Mexicans driving a Dodge pickup on an interstate highway in Oklahoma with hidden currency created probable cause to believe that the currency was the "proceeds" of a drug transaction.[1]

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1. As used in the context of a forfeiture proceeding, the term "proceeds" is a term of art. "Proceeds" is not money that is exchanged for drugs. Although money "exchanged" for drugs is forfeitable under the provisions of 21 U.S.C. § 881(a)(6), the district court rejected the government's contention that the subject currency was "exchanged" for drugs. "Proceeds" as that term is used in 21 U.S.C. § 881(a)(6) is generally understood to be money or property that is acquired with the "exchange" of a drug transaction.

Based on the court's finding of probable cause, the matter was set for jury trial at which the burden of proof shifted to the petitioners to prove that the currency was not the proceeds of the still unarticulated drug offense.[2] The case was tried to a jury and the jury returned a verdict of forfeiture in favor of the United States. Judgment was imposed on the jury verdict by the district court.

The judgment was appealed to the court of appeals which found no errors in the trial court and which affirmed the judgment in all respects.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT

The Court of Appeals' rejection of the petitioners' Excessive Fines Clause argument without evaluating whether the forfeiture was grossly disproportional to the gravity of the petitioners' offense is contrary to Supreme Court precedent and the law of other circuits. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v.*

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2. Were the case to have been tried after August 25, 2000, the burden of proof would not have shifted to the petitioners inasmuch as P.L. 106-213 became law on that date and specifically requires that the government shoulder the burden of proving the forfeitability of the property. *See* 18 U.S.C.A. § 983.

*Bajakajian*, 524 U.S. 321 (1998). As stated by the Eleventh Circuit, the Excessive Fines Clause "*requires* a review of the proportionality of the fine imposed," that is, a review of whether the fine imposed by civil forfeiture is excessive given the criminal offense underlying the action. *See United States v. One Parcel Property Located at 427 and 429 Hall Street*, 74 F.3d 1165, 1172 (11th Cir. 1996) (emphasis added).

In *United States v. Bajakajian*, 524 U.S. 321, 334 (1998), this Court articulated the standard for determining whether a punitive forfeiture is constitutionally excessive — "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." In assessing the gravity of the offense, the *Bajakajian* court considered the nature and extent of the criminal activity, other related illegal activities, the extent of the harm caused by the offense, and the maximum penalties a court could have imposed for the offense. *See also United States v. Ahmad*, 213 F.3d 805, 813 (4th Cir. 2000) (utilizing the *Bajakajian* factors in an Excessive Fines analysis).

In this case, the petitioners were denied an Excessive Fines Clause analysis and, in fact, such an analysis would be impossible in this case as there was no evidence whatsoever of the nature and extent of any criminal activity, there was no evidence presented of other related illegal activities, there was no evidence of the extent of the harm caused by any offense, and there was no maximum penalties a court could have imposed because there was no offense alleged.

Since the *Bajakajian* decision, courts have utilized the fine amounts prescribed by Congress and the United States

Sentencing Commission as a guideline in determining whether a forfeiture is "grossly disproportional" to the offense committed. *See e.g., United States v. 817 N.E. 29th Drive, Wilton Manors, Florida*, 175 F.3d 1304 (11th Cir. 1999) (holding that if the value of the forfeited property is within the range of fines prescribed by Congress or within or near the permissible range of fines under the sentencing guidelines, "the forfeiture almost certainly is not excessive"); *United States v. Two Parcels of Real Property Located at 101 North Liberty Street*, 80 F. Supp. 2d 1298, 1301 (M.D. Ala. 2000) ("[t]he method for determining excessiveness can be straightforward: compare the value of the forfeited property to the fines that could have been imposed at sentencing"). However, in the instant case it is impossible to compare the amount of the forfeited property to a permissible range of fines because there was no offense alleged.

Congress' recent codification of the *Bajakajian* proportionality test, which Congress has determined to be applicable to all civil forfeiture cases, further supports the petitioners' position that an offense must be alleged in order for a court to engage in an Excessive Fines analysis. Specifically, 18 U.S.C.A. § 983(g) provides that a claimant may petition the court to conduct a proportionality test "to determine whether the forfeiture was ***constitutionally*** excessive." 18 U.S.C. § 983(g)(1) (emphasis added). In conducting such a test to determine whether a forfeiture is constitutionally excessive under the Eighth Amendment, courts are required to "compare the forfeiture to the gravity of the offense giving rise to the forfeiture." 18 U.S.C.A. § 983(g)(2). Congress clearly interpreted *Bajakajian* to require an offense to be alleged in order to determine the excessiveness of the forfeiture. Without allegations of an offense, a claimant is deprived of an Excessive Fines determination in violation of the Eighth Amendment.

## II.

## THE QUESTIONS OF LAW RAISED INVOLVE IMPORTANT CONSTRUCTIONS OF THE UNITED STATES CONSTITUTION

The government's failure to provide sufficient notice of the facts giving rise to the forfeiture of the money is in violation of the Due Process Clause of the Fifth Amendment. The Due Process Clause of the Fifth Amendment requires that individuals receive adequate notice and an opportunity to be heard before the Government deprives them of property. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). The Supreme Court has promulgated specific procedural safeguards in order to satisfy the due process concerns involved in *in rem* actions. *See Polar Shipping Limited v. Oriental Shipping Corporation*, 680 F.2d 627, 634-939 (9th Cir. 1982). Specifically, Supplemental Rule E(2) of the Federal Rules of Civil Procedure, which is applicable to civil forfeiture actions, provides that a complaint in a civil forfeiture action:

> shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

FED. R. CIV. P. (Supp. E(2)(a)).

In the context of the instant action, Supplemental Rule E(2) clearly mandates that the government state particular facts giving rise to the forfeiture rather a mere allegation

that the property to be forfeited constitutes proceeds of a crime. The Tenth Circuit recognized this procedural safeguard in *United States v. $39,000 in Canadian Currency*, 801 F.2d 1210, 1217 (10th Cir. 1986).

In *$39,000 in Canadian Currency*, the government filed civil forfeiture complaints against $39,000 in Canadian currency and two cars, alleging that the property was furnished in exchange for a controlled substance or proceeds traceable to such an exchange. The district court dismissed the action on the basis that the government had failed to meet the particularity requirement of Rule E(2)(a). In affirming the District Court's dismissal of the forfeiture complaint, the Tenth Circuit held that "in order to comport with Rule E(2)(a)'s requirement of particularity, the complaint in a civil forfeiture action under section 881 must allege specific facts sufficient to support an inference that the property is subject to forfeiture under the statute." The Tenth Circuit reasoned:

> But the complaint fails to assert facts supporting a reasonable inference that the money was involved in a drug transaction. It specifies no date or location of any purported or intended exchange, no dollar amount of such an exchange, no specific type or quantity of controlled substance, and no identified participant . . . The claims of unidentified parties and unspecified conduct neither give a claimant a reasonable starting point from which to initiate a meaningful investigation nor permit a responsive pleading that can address identities, quantities, locations, or dates of an alleged offense. These unsupported and conclusory allegations do not meet any definition of the word "particularity."

*$39,000 in Canadian Currency*, 801 F.2d at 1220.

Similarly, in *United States v. $40,000.00 in U.S. Currency*, 999 F. Supp. 234 (D. Puerto Rico 1998), the court granted the claimant's motion to dismiss the government's forfeiture petition, holding that the government failed to allege sufficient allegations to prove a nexus between the property to be forfeited and a drug transaction or organization. Similar to the facts in the present case, the government in *$40,000.00 in U.S. Currency* attempted to forfeit currency pursuant to 21 U.S.C. § 881(a)(6) on the basis of a courier profile in addition to a positive drug sniff. However, the court in *$40,000.00 in U.S. Currency* dismissed the petitioner's forfeiture petition, finding that the government had failed to allege a sufficient nexus between the property and a drug transaction.

Likewise, in the instant case the government failed to assert any facts supporting a reasonable inference that the money forfeited was involved in a drug transaction. The complaint fails to allege the dollar amount of any purported or intended exchange for a controlled substance. The complaint fails to allege a type or quantity of controlled substance for which it was exchanged or intended to be exchanged for the currency. The complaint fails to allege any participants who exchanged or intended to exchange the currency for a controlled substance. The complaint fails to allege a place of purchase, the purchase price, the form of payment, the seller, or even the purchaser. Finally, the complaint does not specify who, what, when, where, how, how much or event that the government "heard" that the currency was used or intended to be used to "facilitate" any narcotics violation.

Nevertheless, the appellate court completely disregarded the procedural safeguards encompassed in the due Process Clause of the Fifth Amendment, promulgated by the Supreme Court, and previously recognized by the Tenth Circuit by affirming the government's forfeiture without requiring adequate notice of the alleged offense committed. Petitioners submit that the Fifth Amendment Due Process guarantee requires that a forfeiture complaint contain specific allegations relating to the specific crime giving rise to the forfeiture so as to provide adequate notice under the Due Process Clause.

## CONCLUSION

For the reasons set forth above, the petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED JUNE 30, 2000

**UNITED STATES COURT OF APPEALS**
**TENTH CIRCUIT**

No. 98-5227
(N.D. Oklahoma)
(D.C. No. CV-96-1084-J)

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

$189,825.00 (ONE HUNDRED EIGHTY-NINE THOUSAND EIGHT HUNDRED TWENTY-FIVE) DOLLARS IN U.S. CURRENCY,

Defendant,

EDUARDO RANGEL VELAZQUEZ,
IVAN FARON VELAZQUEZ,

Claimants – Appellants.

**ORDER AND JUDGMENT***

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

*Appendix A*

Before **BRORBY**, **ANDERSON**, and **LUCERO**, Circuit Judges.

The United States brought this civil *in rem* forfeiture action pursuant to 21 U.S.C. § 881(a)(6), seeking forfeiture to the government of $189,825.00 in U.S. currency found by Oklahoma Highway Patrol officers hidden in the gas tank of a Dodge pickup truck.

Eduardo Rangel Velazquez and Ivan Faron Velazquez, respectively, the driver of and passenger in the vehicle, appeared as claimants and opposed the forfeiture on the grounds: (1) that the search and seizure of the vehicle and currency were unreasonable in violation of the Fourth Amendment; (2) that the government's complaint did not satisfy the specificity requirement of Fed. R. Civ. P. Supp. E(2)(a); (3) that the government failed to prove probable cause to institute the suit, as required by 19 U.S.C. § 1615 because it did not establish the existence of a reasonable belief that the currency constituted "proceeds traceable" to a drug transaction within the meaning of 21 U.S.C. § 881(a)(6); and (4) the seizure would violate the Excessive Fines Clause of the Eighth Amendment.

The parties consented to have the case tried by a magistrate judge ("district court" or "court" hereafter), pursuant to 28 U.S.C. § 636(c). The court bifurcated the proceedings, first holding a three-day bench trial on the claimants' motion to suppress on Fourth Amendment grounds and on the issue of probable cause. The court decided against the claimants on those issues. Then the court proceeded to a jury trial on the merits. The jury found in

favor of the government, and the court denied the claimants' Fed. R. Civ. P. 50 motion for judgment as a matter of law.

On appeal, the claimants do not contest the jury verdict but reassert each of the issues stated above, contending that the district court erred in its disposition of those issues and in denying judgment as a matter of law to the claimants. For the reasons stated below, we affirm.[1]

## BACKGROUND

The facts of this case are fully developed in the district court's published opinion, *United States v. $189,825*, 8 F. Supp. 2d 1300, 1303-07 (N.D. Okla. 1998). We refer here only to those facts that are relevant to our discussion of the issues, and consistent with standards that govern our review. That is, we accept factual findings by the district court unless they are clearly erroneous, and follow the court's credibility determinations. *See United States v. Long*, 176 F.3d 1304, 1307 (10th Cir. 1999). With respect to the district court's denial of the claimants' motion to suppress evidence, we view the facts in the light most favorable to the government. *See United States v. Villa Chaparro*, 115 F.3d 797, 800-01 (10th Cir. 1997).

On May 3, 1996, Oklahoma Highway Patrol Officer Larry Jackson stopped a 1996 Dodge Ram extended-cab pickup truck on Interstate 44 because the truck's driver,

1. We deny Claimants' motion to supplement the record with a photograph from a video tape of the truck. The district court denied the introduction of that evidence. We conclude that the court did not abuse its discretion.

Eduardo Rangel Velazquez, changed lanes four times without signaling. The stop occurred between 7:20 a.m. and 7:30 a.m. Officer Jackson determined that neither Eduardo nor his passenger, Ivan Faron Velazquez, spoke English. Jackson escorted Eduardo to the patrol car where Jackson radioed his dispatcher for an interpreter, and showed Eduardo a driver's license, indicating his desire to see Eduardo's license. In response, Eduardo produced a restricted visa and Mexican driver's license, both written in Spanish and largely incomprehensible to Jackson. Jackson's radioed request for an interpreter was overheard by Officer Ron Davis, who responded that he had some Spanish speaking ability and, since he was in the vicinity, would endeavor to assist. He arrived on the scene in ten minutes or less.

While waiting for Davis, Jackson noticed that the truck's license plate frame was out of alignment and the left side of the truck's bumper appeared to be closer to the tailgate than the right side of the bumper. This aroused Jackson's curiosity. He walked around the truck and could not see any evidence of an accident that would cause the misalignments. He also smelled an odor of gasoline. Jackson also noted that the truck was fairly new, with approximately 20,000 miles on it. From his training, Jackson knew that Dodge extended-cab trucks were often used in drug trafficking because they have large gas tanks with a six-inch opening for the "sending unit" through which, when the unit is removed, items can be placed in the gas tank.

Based on facts known to him at that point, Jackson suspected that the vehicle might be involved in drug trafficking. He therefore radioed his dispatcher for a canine

unit to conduct at least an exterior sniff of the vehicle. Tulsa Police Department Officer Ronnie G. LeMaster, an experienced drug detection dog handler, arrived at the scene about 20-30 minutes later with a dog trained to alert on the odor of marijuana, cocaine, heroin or methamphetamine. While waiting for LeMaster, Jackson ran NCIC, EPIC and owner's registration checks on Eduardo and Ivan. Those checks showed that the vehicle was owned by Luciano Chavez of Austin, Texas.

For traffic safety reasons, Jackson moved the Dodge pickup to a parking lot less than a mile away at the next I-44 exit. At that point, LeMaster walked his dog around the truck twice. The dog alerted to the passenger side door both times. LeMaster then opened the door and the dog alerted on the floorboard and seat. LeMaster and Jackson then searched the truck, noting leaking gas, tampering with the support straps for the gas tank, and one broken strap. LeMaster also observed tool marks on several bolts, indicating to him that the bed of the truck had been on and off several times, a technique used to access the sending unit opening in the gas tank. Taps on the gas tank with a nightstick also indicated the presence of a solid object that moved around when the truck was moved and stopped suddenly.

The officers then took the truck to a nearby filling station to raise it on a hoist for a more thorough inspection. That inspection disclosed further evidence that the truck bed had been on and off several times. Jackson then removed the gas tank and sending unit, which was not secured tightly, looked inside the opening that housed the sending unit, and observed several plastic bundles. Subsequently, the officers removed

eleven bundles of currency from the tank. Each bundle was wrapped in three layers of cellophane, vacuum packed, and heat sealed. When counted, the currency totaled $189,825.00.

During these events, including the arrival of a more proficient interpreter, the officers determined that Eduardo and Ivan were from Mexico and were unlawfully in the Tulsa area. Both denied any knowledge of the hidden currency. Neither had a criminal record, as shown by the computer checks. No drugs were found in the vehicle.

## DISCUSSION

### A. Search and Seizure

The claimants contend that the district court erred when it denied their motion to suppress evidence of the currency and other evidence discovered after their initial traffic stop. They argue that the detention and subsequent search were unreasonable in violation of the Fourth Amendment; thus, without the resulting evidence, they were entitled to judgment against the government on the forfeiture complaint.

Although this is a civil case, "the government will be barred from introducing evidence illegally seized in violation of the fourth amendment to prove a claim of forfeiture." *United States v. $149,442.43*, 965 F.2d 868, 872 (10th Cir. 1992). We analyze the Fourth Amendment issue here the same way and under the same authorities used in examining the stop and search of vehicles in criminal cases.

*Appendix A*

Our standard of review regarding the facts is set out above. The ultimate determination of reasonableness is a question of law that we review de novo. *See Long*, 176 F.3d at 1307.

The district court's opinion carefully and thoroughly analyzes this issue. *See United States v. $189,825*, 8 F. Supp. 2d at 1307-11. We adopt its analysis and reasoning, and conclude that the search and seizure here were reasonable.

By way of summary, the claimants conceded at argument that the initial stop was valid. That stop was, of course, limited to its purpose (a traffic violation), unless the officer developed, during the time permitted for the stop, reasonable suspicion of other illegal activity. *See United States v. Soto-Cervantes*, 138 F.3d 1319, 1322 (10th Cir. 1998). The validity of such suspicion is viewed from the standpoint of an experienced officer and based on the totality of the circumstances. *See id.*

The district court's findings regarding the unexplained misalignment of the bumper, the type of truck used to transport contraband in the gas tank, the odor of gas, the travel route, and other factors, justified the district court's conclusion that the officer's suspicion was reasonable and justified a limited further detention of the vehicle and its occupants for a brief additional period for a drug detection dog walk-around of the vehicle. Valid safety concerns further justified moving the vehicle a short distance to a parking lot off the highway.

Once the dog alerted to drugs, the officers had probable cause to search the vehicle. *See United States v. Ludwig*, 10 F.3d 1523, 1527 (10th Cir. 1993). Further probable cause to detain the truck and search the gas tank was developed at the scene by visual confirmation of tampering with the gas tank, evidence that the bed of the truck had been removed (a technique for accessing the opening for the sending unit), and the presence of gas leakage (indicating that the gas tank had in fact been accessed).[2] Removal to a nearby gas station for the purpose of continuing the probable cause search of the gas tank was proper, and the search there revealed the money.

This sequence of events did not violate the Fourth Amendment.

**B. Specificity of the Complaint**

A complaint for forfeiture, such as that filed by the government in this case, must "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able . . . to commence an investigation for the facts and to frame a responsive pleading." Fed. R. Civ. P. Supp. E(2)(a).

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2. The claimants argue that law enforcement advisories regarding the use of Dodge pickup trucks to transport contraband in their gas tanks referred to a model other than the one they were driving. Even if true, that fact would not vitiate the reasonableness of Jackson's good faith belief that the vehicle he was inspecting was the type referenced in the advisories.

*Appendix A*

We have construed that rule to require the allegation of "specific facts sufficient to support an *inference* that the property is subject to forfeiture under the statute." *United States v. $39,660 in Canadian Currency*, 801 F.2d 1210, 1219 (10th Cir. 1986) (emphasis added).

The claimants contend that the government's complaint in this case failed to satisfy these requirements. The district court did not address the issue, and the parties dispute whether it was raised. We think it was, although not pursued. In any event, the complaint and attached affidavit filed in this case, included at Appellant's App. at 24-31, contain most of the information that we detail in the next section of this opinion regarding probable cause. Those allegations unquestionably raise the necessary inference, which is short of showing probable cause. *See United States v. Daccarett*, 6 F.3d 37, 47 (2d Cir. 1993) ("complaint does not have to meet the ultimate trial burden of showing probable cause for forfeiture").

Furthermore, with respect to the basis for forfeiture that the government ultimately pursued in this case, the claimants do not demonstrate any material impediment to their ability to investigate or frame a responsive pleading. And, in fact, they did frame and file a full responsive pleading. Thus, we are unpersuaded by the claimants' arguments on this issue.

### C. Probable Cause that the Currency is "Proceeds" of a Drug Transaction

Congress has provided that the following shall be subject to forfeiture to the United States:

> All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, *all proceeds traceable to such an exchange*, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter . . . .

21 U.S.C. § 881(a)(6) (emphasis added).

Although the government pled more broadly in its amended complaint,[3] the government's case proceeded on the theory that the currency in this case constituted "proceeds" from a drug transaction within the meaning of § 881(a)(6). It is the allocation of the burden of proof in these cases that underlies the issue raised by the claimants as to the "proceeds" claim.

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3. As the district court fully explains in its opinion, the government also invoked 31 U.S.C. §§ 5316, 5317(c), but did not pursue those claims, and only presented evidence on the "proceeds" theory under § 881(a)(6).

*Appendix A*

In forfeiture actions "the burden of proof shall lie upon [the] claimant . . . [p]rovided [t]hat *probable cause shall be first shown* for the *institution* of such suit or action, *to be judged by the court*." 19 U.S.C. § 1615 (emphasis added).

As to that requirement, we have said:

> [T]he Government bears the burden of going forward, and must show *probable cause* that the property subject to forfeiture is *involved in criminal activity*. Once this is established, the burden shifts to the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture.

*$39,660 in Canadian Currency*, 801 F.2d at 1216-17 (emphasis added).

The claimants contend that the government failed to establish probable cause that the money hidden in the gas tank constituted proceeds from drug trafficking, and that the district court erred in denying their Fed. R. Civ. P. 50 motion on this ground. In our analysis of this claim, we first emphasize the governing standards. As the district court points out, we have said:

> The test for determining probable cause for forfeiture purposes is the same as applied in arrests, searches and seizures. Accordingly, the government must demonstrate a *reasonable ground for belief* of guilt supported *by less than prima facie proof, but more than mere suspicion.*

*Appendix A*

> *Circumstantial evidence of drug transactions may support the establishment of probable cause.* However, *the presence or absence of any single factor is not dispositive.* Once probable cause for forfeiture has been established, claimants may recover the defendant property only by establishing a defense to forfeiture by a preponderance of the evidence.

*$149,442.43*, 965 F.2d at 876-77 (internal quotations, citations, and footnotes omitted) (emphasis added).

Contrary to arguments made by the claimants, the government is not required to show that the proceeds probably came from any particular drug transaction, or such details as the time, location, or amount per transaction. *See United States v. $36,634*, 103 F.3d 1048, 1053 (1st Cir. 1997); *United States v. $4,255,000*, 762 F.2d 895, 904 (11th Cir. 1985). The government is only required to establish probable cause as to a nexus between the proceeds and criminal drug activity. *See Daccarett*, 6 F.3d 37, 56 (2d Cir. 1993).

Applying these standards to the facts here, the district court found a reasonable belief "that the defendant currency is the proceeds of the sale of a controlled dangerous substance" based on the following:

1. The money was hidden in the gas tank of a Dodge pickup truck. Dodge pickup trucks are frequently used by drug traffickers because the large gas tank and gas tank openings make it

easy to conceal drugs and drug proceeds. Gas tanks are often used to conceal drug proceeds because the gas and the tank help mask the odor of drugs.

2. Mexico is a known transit zone for drugs headed to the United States from Central and South American countries and for drug proceeds headed to Central and South American countries from the United States.

3. Several characteristics of the drug courier profile are present.

   a. The truck was being driven by two Mexican nationals who did not have proper visas and who did not own the truck. The owner of the truck was not present and Claimants disavowed any knowledge of the currency when it was found in the truck's gas tank.

   b. The truck was headed south on Interstate 44 from an interior state to Mexico, a border state. I-44 is known to law enforcement agencies as a drug pipeline or drug courier route.

   c. The driver and passenger of the truck had been on a long trip allegedly for recreation, but only had a brief stay at their claimed destination before beginning the return trip.

d. Neither the driver nor the passenger had criminal records.

e. The truck was relatively new with high mileage.

f. There is some evidence to suggest that the bed of the truck had been on and off several times.

g. It is common for there to be two passengers so that one can driver [sic] and one can sleep while the other is driving. This permits long distances to be covered in a short time.

4. The large amount of currency involved.

5. The fact that Officer LeMaster's drug-sniffing canine hit on the exterior and interior of the truck, indicating the presence of drugs in the truck at some time.

6. The unique packaging of the currency — triple-wrapped in cellophane, heat-sealed and vacuum-packed. Agent Judd[4] testified credibly that out of the numerous currency seizures he has made, assisted or witnessed, the only currency he has seen packaged the way the

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4. Judd, a former FBI and Border Patrol agent, is assistant to the Drug Czar and advises the President on drug interdiction.

> defendant currency was packaged is currency that had some connection to drugs. Agent Judd testified that he had never seen currency packaged the same as the defendant currency that was not connected to drugs. According to Agent Judd, currency is packed the way the defendant currency was packaged for two reasons: two [sic] mask the odor of drugs and to prevent the cash from mildewing as the cash makes its way through the jungles of Mexico and Central and South America.

*$189,825*, 8 F. Supp. 2d at 1313-14 (citations omitted).

To these facts we add the temporal proximity between the cash and drug transport in the same vehicle. The truck was only a few months old. The drug detection dog alert established the probability that during this relatively short time the truck was used to transport drugs and was being used at the time of the stop to transport cash, wrapped and secreted in a manner consistent with drug money. Also during this short time, the truck had crossed into Mexico and had traveled long distances, consistent with its probable use in drug trafficking — an illegal business conducted for the money it produces.

The claimants rely upon numerous cases in which courts have denied forfeiture, concluding that the government did not establish probable cause. We have examined them all. None creates any bright line test relevant or controlling here. Each is clearly distinguishable on its facts. The law is that we determine probable cause based on the totality of the

circumstances in each case. *See United States v. United States Currency deposited in Account No. 1115000763247*, 176 F.3d 941, 944 (7th Cir. 1999). That is necessarily a case-by-case, fact specific inquiry. In this case we conclude that, considering all the facts, the government established probable cause, i.e., a reasonable belief,[5] that the defendant currency is proceeds from drug trafficking within the meaning of the statute.[6] This reasonable belief was sufficient to shift the burden of proof to the claimants, as provided by the statute, to prove by a preponderance of the evidence that the defendant currency was not proceeds from drug trafficking.

**D. Eighth Amendment Excessive Fines Provision**

We have previously held that the forfeiture of drug proceeds does not violate the Eight Amendment. *See United States v. Lot 41, Berryhill Farm Estates*, 128 F.3d 1386, 1395-96 (10th Cir. 1977) (finding "as a matter of law that

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5. The claimants raise various arguments about when the government must possess the facts necessary for probable cause. The statute clearly refers to the institution of the suit. In any event, however, the claimants do not demonstrate that any material part of the facts relied upon by the district court was not known to the government when it filed its complaint for forfeiture.

6. The claimants also argue that the term "proceeds" as used in § 881(a)(6) does not refer to money, citing Matthew Bender, "Prosecution and Defense of Forfeiture Cases," David B. Smith, ¶ 403[4] (1999). They do not show where they raised this argument before the district court, and the court did not rule on it. We will not consider arguments raised for the first time on appeal. *See Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992). In any event, we find the contention unpersuasive.

forfeiture of drug proceeds pursuant to § 881(a)(6) can never be constitutionally excessive" and noting that "proceeds produced by an individual drug trafficker is always roughly equivalent to the costs that drug trafficker has imposed on society"). Accordingly, we reject the claimants' argument on this issue.

## CONCLUSION

For the reasons stated above, the judgment of forfeiture is AFFIRMED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED JUNE 3, 1998

United States District Court,
N.D. Oklahoma.

**UNITED STATES of America,**

**Plaintiff,**

**v.**

**$189,825.00 IN UNITED STATES CURRENCY,**

**Defendant,**

**and**

**Eduardo Rangel Velazquez, and
Ivan Faron Velazquez,**

**Claimants.**

**No. 96-CV-1084-J.**

June 3, 1998.

* * *

ORDER[1]

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1. This Order is entered pursuant to 28 U.S.C. § 636(c) and the parties' Consent to Proceed Before United States Magistrate Judge. [Doc. No. 29].

*Appendix B*

JOYNER, United States Magistrate Judge.

Plaintiff, the United States of America ("the Government"), filed this in rem forfeiture action seeking a judgment that the defendant currency has been forfeited to the United States pursuant to either 21 U.S.C. § 881(a)(6) or 31 U.S.C. § 5317(c). Now before the Court is Plaintiff's Amended Complaint for forfeiture and Claimants' Claims of Interest.

Claimants allege that the traffic stop and the resulting detentions and searches that lead to the discovery of the defendant currency violated the Fourth Amendment to the United States Constitution. Claimants also allege that the Government does not have probable cause under 19 U.S.C. § 1615 to forfeit the defendant property under either § 881(a)(6) or § 5317(c). The Court has previously bifurcated this action into two stages — a probable cause stage and, if necessary, a merits stage. The probable cause stage was conducted without a jury on April 27, 28 and May 1, 1998. On those dates, the Court held an evidentiary hearing and received evidence relevant to Claimants' Fourth Amendment and § 1615 challenges to the Government's forfeiture claim.[2]

After reviewing the evidence received and relevant precedent, the Court finds (1) that the stop, detention and seizure in this case did not violate the Fourth Amendment,

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2. The following exhibits were admitted at the hearing: Government's exhibits 1A-1X, 2-4, 6, 15A-15GG, 16A-16B and 19; Claimants' exhibits 2-3, 4A, 5, 6, 8-10, 13, 15-17, and 34. All other exhibits were not admitted for purposes of the probable cause stage.

and (2) that the Government does have probable cause under § 1615 to seek forfeiture of the defendant currency as proceeds of a drug transaction.

## I. THE STOP, DETENTIONS, SEARCHES AND SEIZURES IN THIS CASE WERE CONSTITUTIONALLY VALID.

### A. FACTUAL CONCLUSIONS[3]

Prior to May 1996, the speed limit in Oklahoma had recently increased. As a result, there had been an increased number of car accidents in Oklahoma. According to the data available to the Oklahoma Highway Patrol ("OHP"), three types of conduct were major factors contributing to the increased number of accidents — speeding, unsafe lane changes and following too closely. The OHP in Tulsa, Oklahoma decided that it would institute a special emphasis traffic control program focusing on speeding, unsafe lane change and following too closely violations.

At all relevant times, Larry Jackson was a field supervisor for and second lieutenant with Troop B of the OHP. On Friday, May 3, 1996, Lt. Jackson was patrolling Interstate 44 ("I-44") through Tulsa as part of the OHP's special emphasis program. Lt. Jackson was traveling west on I-44 and between 7:20 a.m. and 7:30 a.m. he observed a white and blue 1996 Dodge Ram pickup truck also driving

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3. In this section, the Court will outline its factual conclusions. Facts presented at the hearing but not discussed in this section were found not to be relevant to the Court's Fourth Amendment analysis.

west on I-44. From his rear-view mirror, Lt. Jackson observed the driver of the truck make three lane changes without using a signal. Lt. Jackson did not focus on the driver of the truck while the three lane changes were occurring. Lt. Jackson slowed his patrol car, pulled in behind the truck and witnessed a fourth lane change without a turn signal. Lt. Jackson then initiated a traffic stop for unsafe lane changes. See 47 Okla.Stat. § 11-309(1) (prohibiting lane changes without using a signal).

1. The First Location — Interstate 44

Lt. Jackson stopped the truck. The driver of the truck did not try to evade Lt. Jackson in any way. As he approached the truck, Lt. Jackson noticed it had Texas license plates and that a passenger had been lying down in the extended cab of the truck. The driver of the truck was a Hispanic male named Eduardo Rangel Velazquez and the passenger was a Hispanic male named Ivan Faron Velazquez. Eduardo and Ivan are the claimants in this forfeiture proceeding.

After stopping the truck, Lt. Jackson approached Eduardo, the driver of the truck, and determined that neither Eduardo nor Ivan could speak English. Lt. Jackson escorted Eduardo to his patrol car. Ivan stayed in the truck. While in the patrol car, Lt. Jackson removed his own driver's license and showed it to Eduardo and asked Eduardo if he had something similar. Eduardo responded by producing those items reflected in Government's exhibit 16B.

Government's exhibit 16B shows a visa permitting the person holding it to cross the United States/Mexico border.

*Appendix B*

With a visa such as Government's exhibit 16B, the visa holder cannot travel more than 25 miles into the United States. Government's exhibit 16B also shows a Mexico driver's license for Eduardo. Lt. Jackson was not able to read these documents. He was, however, able to determine that they represented border crossing documents and a Mexican driver's license. At some point, Lt. Jackson also obtained a Texas identification card from Ivan, the passenger of the truck.

Once Lt. Jackson and Eduardo reached the patrol car, Lt. Jackson asked his dispatcher to locate a Spanish interpreter. OHP trooper Ron Davis heard the request and relayed that he had limited Spanish abilities, was near Lt. Jackson's location, and would respond to Lt. Jackson's location to see if he could assist Lt. Jackson. Trooper Davis arrived on the scene approximately 8-10 minutes after Lt. Jackson's initial stop. Unbeknownst to Lt. Jackson, the dispatcher heard Trooper Davis' response and the dispatcher did not follow through on Lt. Jackson's request for an interpreter. Once Trooper Davis arrived, he helped Lt. Jackson interpret Government's exhibit 16B. Trooper Davis also ascertained that (1) Eduardo and Ivan were from Mexico, (2) neither Eduardo nor Ivan owned the truck, and (3) Eduardo and Ivan claimed that they had been to St. Louis, Missouri and were returning to Mexico. Trooper Davis did have some trouble with the particular dialect being spoken by Eduardo and Ivan.

Lt. Jackson's patrol car was parked directly behind the truck. While waiting for Trooper Davis to arrive so that he could converse with Eduardo and Ivan, Lt. Jackson and

Eduardo were seated in Lt. Jackson's patrol car. Lt. Jackson noticed that the truck's license plate frame was not aligned properly and that the left side of the truck's bumper appeared to be closer to the tailgate than the right side of the bumper.[4] This aroused Lt. Jackson's curiosity. Lt. Jackson got out of the patrol car and walked around the truck. Lt. Jackson was looking for evidence of an accident that would account for the misaligned bumper and license plate frame. He found none. During his walk around, Lt. Jackson smelled a faint odor of gasoline on the driver's side of the truck. The truck was still running. Lt. Jackson bent down and took a quick look under the truck. He saw nothing suspicious.

During his walk around, Lt. Jackson also did not see the type of luggage he thought would be carried by someone traveling from Mexico. Lt. Jackson admits, however, that he did not ask Eduardo or Ivan if they had luggage and he could not see in all places where luggage might be stored in the truck. In fact, there was a duffle bag, a pillow and a coat in the truck. The duffle bag contained two sets of clothes and some toiletries, including toiletries from a Hampton Inn. See Claimants' exhibit 8, 9 and 34.

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4. Claimants have suggested throughout the proceedings in this case that there was in fact nothing wrong with the bumper, tailgate or license plate cover of the truck. Nevertheless, the Court finds Lt. Jackson's testimony regarding the truck's bumper, tailgate and license plate cover to be credible. Lt. Jackson was in the best position to observe the rear of the truck on the day of the stop. The Court is not persuaded that Lt. Jackson is lying or embellishing. The Court is also not persuaded that the exhibits relied on by Claimant's (i.e., photographs and video of the truck) undermine Lt. Jackson's testimony regarding the condition of the truck's bumper, tailgate or license plate cover.

Lt. Jackson also observed that the truck was fairly new, with approximately 20,000 miles on it. Lt. Jackson was also aware from his training that Dodge extended cab trucks were often used in drug trafficking because they have large gas tanks with a large opening through which items can be placed. The gas tanks in Dodge extended cab trucks have a sending unit mounted on them. This sending unit picks up the gasoline in the tank and sends it to the engine. When this sending unit is removed, there is a six inch hole in the tank. Lt. Jackson learned about Dodge truck gas tanks from monthly law enforcement bulletins he receives, including EPIC bulletins. See Government's exhibit 19.

Based on the facts known to him at this point, Lt. Jackson asks his dispatcher to call the Tulsa Police Department ("TPD") to see if the TPD would send a canine unit to his location. Lt. Jackson testified that he asked for a canine unit at this point because he was concerned that the truck was being used to transport drugs. At about the same time, Lt. Jackson requested his dispatcher to run NCIC,[5] EPIC[6] and owner's registration checks on Eduardo and Ivan. The NCIC and EPIC checks came back negative and the

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5. NCIC is an acronym for the National Crime Information Center operated by the Federal Bureau of Investigation.

6. EPIC is an acronym for El Paso Information Center. EPIC is an agency of the federal government within the Department of the Treasury. EPIC gathers information for use by all law enforcement agencies. It maintains records of border crossings. It also gathers intelligence about drug trafficking, including information about vehicles known or suspected to be involved with drugs.

registration check revealed that the truck was owned by Luciano Chavez, a resident of Austin, Texas.

Officer Ronnie G. LeMaster, a canine officer with the TPD, was paged and he arrived at Lt. Jackson's location approximately 20-30 minutes after Lt. Jackson's initial stop. When Officer LeMaster arrived at the scene, morning rush-hour traffic had begun to back up on I-44. The motoring public was slowing down to see what was happening on the side of the highway. Cars were slamming on their brakes. Officer LeMaster walked around the truck once himself. Ivan was removed from the passenger side of the truck and placed in a patrol car different than the one in which Eduardo was seated. Officer LeMaster then removed his dog from his patrol car and walked the dog half way around the truck. Because of the traffic, the dog was skittish and there was no room to walk the dog around the driver's side of the truck. Officer LeMaster stopped walking his dog around the truck because he determined that the truck's current location threatened his safety, his dog's safety, and the motoring public's safety. The truck could not be moved further off I-44 because it was stopped next to an embankment and a guardrail.

The length of the stop at the first location was approximately 45 minutes. Lt. Jackson admits that neither Eduardo nor Ivan were free to leave the first location. Neither Lt. Jackson nor Officer LeMaster testified that Eduardo and Ivan were nervous. Eduardo was quiet and Ivan appeared to be sleepy.

*Appendix B*

2. The Second Location — Parking Lot Off I-44

Lt. Jackson and Officer LeMaster agreed to move the truck to a parking lot at the next I-44 exit. By this time, Lt. Jackson had returned Eduardo's and Ivan's credentials. Lt. Jackson moved the truck approximately 1/4-1/3 mile to a parking lot directly off the next I-44 exit. While the truck was being moved, Officer LeMaster asked the TPD dispatcher to send an interpreter who could speak Spanish.

Trooper Davis explained to Eduardo and Ivan in Spanish that a dog was going to be walked around the truck, that they were being detained for investigative purposes and that they should remain calm. All people were moved away from the truck and Officer LeMaster retrieved his dog from his patrol car and walked the dog around the truck twice. The truck's engine was still running. The dog alerted on the passenger-side door seam in both walk-arounds. Officer LeMaster then opened the passenger-side door and the dog alerted on the floor board and seat.[7] Officer LeMaster then returned his dog to the patrol car.

Officer LeMaster then conducted a thorough search of the interior of the truck's cab. While squatting down on the passenger side to look under the seat, Officer LeMaster smelled a strong odor of gasoline. Officer LeMaster's search of the interior of the cab did not last long because the strong

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7. At the time of the stop, Office LeMaster had been handling drug detection dogs for more than 25 years. Officer LeMaster and the dog had been together approximately 9 months at the time of the stop. The dog was trained to alert on the odor of marijuana, cocaine, heroin, or methamphetamine.

odor of gasoline shifted his attention to the underside of the truck.

Officer LeMaster looked under the truck and saw gas leaking onto the ground. Officer LeMaster also noticed that the support straps for the truck's gas tank were not in their original position. Officer LeMaster then walked around to the driver's side, and between the cab and the bed he saw that one of the gas tank's yellow carrying straps was broken and was sticking up between the cab and the bed. Officer LeMaster looked under the truck again and noticed what he believed to be wrench and tool markings on several bolts, indicating to him that the bed of the truck had been on and off several times.

Lt. Jackson also searched the truck while Officer LeMaster was searching the truck. Lt. Jackson looked in the glove box, under the seats, around the dash, in the speaker wells, etc. Lt. Jackson was searching for false compartments. Lt. Jackson found receipts, toll tickets, and border crossing documents. Government's exhibit 16A was discovered during this search.[8] During the search, Lt. Jackson saw the broken, yellow gas tank strap sticking up between the cab and the bed of the truck. Lt. Jackson also smelled gasoline. Lt. Jackson looked under the truck and noticed something seeping down the side of the gas tank. Lt. Jackson touched

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8. Government's exhibit 16A is a temporary permit to cross the United States/Mexico border and exceed the 25 mile limit. The temporary permit was issued in April 1996 and it expired on May 1, 1996. The temporary permit limited travel to five states — California, Arizona, New Mexico, Nevada and Texas. The temporary permit showed San Antonio, Texas as the driver's destination.

his finger to the liquid and brought his finger to his nose. The liquid was gasoline. Unlike Officer LeMaster, Lt. Jackson did not see gasoline dripping on the ground. Lt. Jackson also noticed that the support straps holding the gas tank had caused some wear on the tank, as if they had been removed and not tightened properly.

Officer LeMaster then took his nightstick and tapped it along the bottom of the truck's gas tank. At one spot the tank sounded solid and at another the tank sounded full of liquid. Lt. Jackson got into the truck, drove it forward and slammed on the brakes. Officer LeMaster tapped on the truck's gas tank again and the solid and liquid sounds had shifted. Officer LeMaster and Lt. Jackson discussed their findings with each other and Lt. Jackson decided to move the truck to a nearby filling station so that the truck could be raised on a rack.

The length of the stop at the second location was approximately 20 to 30 minutes. Eduardo and Ivan were in separate patrol cars while at the second location. According to Lt. Jackson, Eduardo and Ivan were never free to leave the second location.

3. The Third Location — Phillips 66 Filling Station

Lt. Jackson drove the truck approximately three miles to a Phillips 66 filling station that was equipped with vehicle racks. The truck was raised on a rack and its underside was inspected thoroughly. Lt. Jackson and Officer LeMaster both observed tool marks, grease marks, scratches on the frame, and missing bolts. These markings indicated to Lt. Jackson

and Officer LeMaster that the bed of the truck had been off and on several times. Lt. Jackson testified that based on his training, he was aware that those using a Dodge truck gas tank to conceal contraband often removed the bed of the truck to access the gas tank, rather than remove the gas tank itself, because it was easier.

Lt. Jackson removed the truck's gas tank. The sending unit attached to the tank was not secured tightly. The sending unit was removed from the tank. Once the sending unit was removed, Lt. Jackson saw several plastic bundles in the gas tank. See Government's exhibits 1R-1V. Eleven bundles of money were removed from the tank. Each bundle was wrapped in three layers of cellophane, vacuum packed, and heat sealed. See Government's exhibits 1W-1X and 15. The money was discovered within an hour of arriving at the gas station.

Shortly after the truck arrived at the Phillips 66, Demita Kinard, a Spanish-speaking interpreter with the TPD arrived at the scene in response to Officer LeMaster's earlier request for an interpreter.[9] When she arrived, Officer Kinard was briefed and Lt. Jackson asked her to tell Eduardo and Ivan that he was going to remove the truck's gas tank and that if no contraband was found, they would be free to leave. Officer Kinard communicated this to Eduardo and Ivan in Spanish. At the time, Eduardo and Ivan were in separate patrol cars and Officer Kinard was shuttling between cars. Lt. Jackson

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9. Officer Kinard has received training from the TPD in interpretation. Officer Kinard has an undergraduate degree in Spanish and she lived in Venezuela for four to five months.

also asked Officer Kinard to obtain general background information from Eduardo and Ivan.

Eduardo and Ivan each told Officer Kinard the same coherent story. They both told Officer Kinard that they were returning from St. Louis, Missouri after seeing a baseball game and visiting an amusement park and that they had been paid $100.00 in gas money to drive the truck and meet Mr. Chavez, the owner of the truck, in Tulsa, Oklahoma at 10:30 a.m. that morning. Eduardo and Ivan stated that (1) Mr. Chavez owns a business that supplies fireworks for special occasions, (2) that Mr. Chavez was in Tulsa purchasing fireworks from OK Fireworks, Inc., and (3) that the fireworks purchased by Mr. Chavez were going to be transported to Laredo, Texas in the truck.

After the money was found, Eduardo and Ivan were handcuffed and placed under arrest.[10] Officer Kinard mirandized Eduardo and Ivan using a miranda card written in Spanish. Eduardo and Ivan were then formally placed under arrest. Officer Kinard then questioned Eduardo and

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10. The evidence regarding the handcuffing of Claimants is in dispute. Officer Kinard's testimony suggests that Claimants were handcuffed at some time prior to their arrest. Lt. Jackson's and Officer LeMaster's testimony suggests that Claimants were not handcuffed until they were arrested. Claimants have the burden of establishing facts necessary to prove that their Fourth Amendment rights have been invaded. Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); Wilson v. United States, 218 F.2d 754, 757 (10th Cir.1955). Based on the conflicting testimony, the Court finds that Claimants have not established that they were handcuffed prior to their custodial arrest.

Ivan to see if they knew anything about the money in the gas tank. Both denied any knowledge of the money and told Officer Kinard that they had been hired to drive the truck.

The parties were at the gas station for another hour while the truck was put back together. The truck was then transported approximately 1/4 mile to OHP headquarters, where it was impounded with the motor vehicle division. Once at OHP headquarters, the money was counted and determined to be $189,825.00 in United States currency — the defendant in this forfeiture action. Lt. Jackson requested another EPIC check on the truck and determined that the truck had crossed the Mexico/United States border at Laredo, Texas on April 29, 1996. Eduardo and Ivan were later booked into the Tulsa County Jail.

The length of the stop at the third location was approximately 2 hours and 15 minutes. Eduardo and Ivan were mirandized and arrested approximately one hour after arriving at the third location. Thus, approximately 2 1/2 to 3 hours elapsed between the initial stop and the finding of the money and the mirandizing and arrest of Eduardo and Ivan.

B. FOURTH AMENDMENT ANALYSIS

A traffic stop is a seizure within the meaning of the Fourth Amendment to the United States Constitution.[11]

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11. As the driver and passenger of the truck, Claimants have standing to challenge the stop and detention of the truck under the Fourth Amendment. See United States v. Erwin, 875 F.2d 268, 270

(Cont'd)

A traffic stop is, however, an investigative detention, not a custodial arrest. United States v. Wood, 106 F.3d 942, 945 (10th Cir.1997). Traffic stops are, therefore, subject to the two-pronged analysis established by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 19-20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). First, the traffic stop must have been justified from its inception. That is, the vehicle must have been stopped for a legitimate law-enforcement reason. Second, the law-enforcement officer's actions during the detention must be reasonably related in scope to the circumstances justifying the traffic stop. Wood, 106 F.3d at 945.

Because a traffic stop is an investigatory detention and not a custodial arrest, the length of the detention must be brief and reasonable under the circumstances. The scope of the investigation must also be carefully tailored to the underlying justification for the stop. Wood, 106 F.3d at 945. During a traffic stop, a law-enforcement officer may ask questions about the vehicle's ownership, the identity of the vehicle's occupants, and the occupant's travel plans. United States v. Rivera, 867 F.2d 1261, 1263 (10th Cir.1989).

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(Cont'd)

(10th Cir.1989). The Court also finds that Claimants have standing to challenge the search of the truck because the Government has not argued that the Claimants' lack standing to challenge the search of the truck. See, e.g., United States v. Miller, 84 F.3d 1244, 1249-50 (10th Cir.1996), overruled on other grounds by United States v. Holland, 116 F.3d 1353 (10th Cir.1997) (holding that a party lacks standing to object to the search of a vehicle if he cannot prove he is the owner of or has lawful possession of the vehicle at the time of the search).

*Appendix B*

An ordinary traffic stop must last no longer than is necessary to allow the law-enforcement officer to (1) investigate the alleged traffic violation, (2) run a check on the driver, (3) ensure that the driver has a valid license, (4) check the vehicle's registration and run a check on the vehicle, (5) verify that the vehicle is insured, and (6) issue citations. Wood, 106 F.3d at 945; United States v. Martinez, 983 F.2d 968, 974 (10th Cir.1992).

The length and scope of a valid traffic stop can be expanded beyond the basic inquiries described above only if the driver consents or if the law-enforcement officer has a reasonable suspicion, based on particularized and objective factors, for suspecting criminal activity. United States v. McKneely, 6 F.3d 1447, 1451 (10th Cir.1993); United States v. Lambert, 46 F.3d 1064, 1069 (10th Cir.1995); Wood, 106 F.3d at 946. The Fourth Amendment requires only a minimal level of objective justification for making an investigative detention. Considerably less than proof of wrongdoing by a preponderance of the evidence, but something more than an inchoate and unparticularized suspicion or hunch, is required. Wood, 106 F.3d at 946.

A law-enforcement officer's reasonable suspicion of further criminal activity may be based on the common sense and ordinary human experience of all the law-enforcement officers at the scene. Officers properly investigating one kind of offense are not required to ignore suspicious circumstances suggesting the commission of other kinds of offenses. See, e.g., United States v. Jones, 44 F.3d 860 (10th Cir.1995); and United States v. Arango, 912 F.2d 441 (10th Cir.1990). Whether an officer's suspicion is reasonable is determined

from the totality of the circumstances he has observed, and no one factor is controlling. United States v. Soto, 988 F.2d 1548, 1555 (10th Cir.1993). The Court will defer to a law-enforcement officer's ability to distinguish between innocent and suspicious actions. United States v. Lopez-Martinez, 25 F.3d 1481, 1481 (10th Cir.1994).

1. Validity of The Stop — Terry Step One

Lt. Jackson testified that he stopped the truck because he had observed the driver of the truck make four lane changes without signaling. At the evidentiary hearing, Claimants suggested that Lt. Jackson's stop was a pre-textual stop. Claimants allege that Lt. Jackson stopped the truck because the driver was Hispanic, and not because a traffic offense had been committed. Claimants' allegation that the initial stop was pre-textual must be analyzed using the standard articulated by the Tenth Circuit in United States v. Botero-Ospina, 71 F.3d 783 (10th Cir.1995).

The Tenth Circuit adopted the following standard in Botero-Ospina:

> [A] traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring. It is irrelevant, for purposes of Fourth Amendment review, 'whether the stop in question is sufficiently ordinary or routine according to the general practice of the police department or the

particular officer making the stop.' It is also irrelevant that the officer may have had other subjective motives for stopping the vehicle. Our sole inquiry is whether this particular officer had reasonable suspicion that this particular motorist violated 'any one of the multitude of applicable traffic and equipment regulations' of the jurisdiction. . . .

. . . .

It goes without saying that, by adopting the standard we do today, we do not abandon the traveling public to 'the arbitrary exercise of discretionary police power.' Our holding in this case properly focuses on the very narrow question of whether the initial stop of the vehicle is objectively justified. We leave intact the vast body of law which addresses the second prong of the Terry analysis — whether the police officer's actions are reasonably related in scope to the circumstances that justified the interference in the first place. Our well-developed case law clearly circumscribes the permissible scope of an investigative detention. Therefore, if an officer's initial traffic stop, though objectively justified by the officer's observation of a minor traffic violation, is motivated by a desire to engage in an investigation of more serious criminal activity, his investigation nevertheless will be circumscribed by Terry's scope requirement.

Botero-Ospina, 71 F.3d at 787-88 (internal footnotes and citations omitted). See also, Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996) (holding that subjective intentions play no role in Fourth Amendment analysis and that a law-enforcement officer's subjective motivation will not invalidate objectively justifiable behavior).

Applying Botero-Ospina in this case, the Court finds that the initial stop of the truck was valid. Lt. Jackson stopped the truck because he observed a violation of Oklahoma's traffic laws. See 47 Okla.Stat. § 11-309(1).[12] Nothing more is required to satisfy the Botero-Ospina standard. Lt. Jackson's subjective intentions are irrelevant. Lt. Jackson

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12. Section 11-309 provides as follows:

> Driving on roadways laned for traffic
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> Whenever any roadway has been divided into two or more clearly marked lanes for traffic, the following rules in addition to all others consistent herewith shall apply.
>
> 1. A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety and then given a signal, not less than the last one hundred (100) feet traveled by the vehicle, of his intention to change lanes.

42 Okla.Stat. § 11-309(1). This section requires that a signal be given for at least 100 feet of travel before any lane change is attempted. Thus, changing lanes without a signal is a violation of this section.

also testified that on the day in question, the OHP was focusing on speeding, following too closely and unsafe lane change violations. It is, therefore, entirely credible that Lt. Jackson would be watching for and stopping drivers making unsafe lane changes. Claimants make much of the fact that Lt. Jackson observed three of the four lane changes from his rear-view mirror in rush-hour traffic. Given Lt. Jackson's training and 13 years of experience patrolling Oklahoma highways for traffic violations, the Court finds it entirely credible that Lt. Jackson could and did observe three lane changes from his rear-view mirror in rush-hour traffic.

2. Duration of The Stop and Scope of The Investigation — Terry Step Two

Based on the facts of this case, the Court finds that Lt. Jackson's stop for an unsafe lane change justified the detention in this case until shortly after Trooper Davis arrived and helped Lt. Jackson communicate with Eduardo and Ivan and helped Lt. Jackson interpret the documents he had been given by Eduardo and Ivan. Unlike most traffic stops, this stop was complicated by the language barrier between Lt. Jackson, Eduardo and Ivan. Lt. Jackson was justified in detaining Eduardo and Ivan until he could obtain some assistance from a Spanish-speaking officer.

Once Trooper Davis arrived and helped Lt. Jackson converse with Eduardo and Ivan and once Lt. Jackson had received reports back on the routine checks he had requested, Lt. Jackson was obligated to issue a citation and release Eduardo and Ivan. Lt. Jackson was justified in extending Eduardo's and Ivan's detention for the canine sniff only if

Eduardo and Ivan consented or if Lt. Jackson had a reasonable suspicion, based on particularized and objective factors, for suspecting additional criminal activity. Eduardo and Ivan did not consent to any additional detention or any searches of the truck. Thus, Lt. Jackson's further detention of the truck will be deemed reasonable only if the Government can point to particularized and objective factors which would form the basis for a reasonable suspicion that the truck was involved in a violation of local, state or federal drug laws.

This case is distinguishable from United States v. Morales-Zamora, 914 F.2d 200 (10th Cir.1990). In Morales-Zamora, the vehicle was subject to a canine sniff, but the sniff was completed within the time it took the stopping-officer to complete a license, registration and insurance check. In this case, Officer LeMaster may have arrived at a time that required no additional justification for a canine sniff. Officer LeMaster was, however, unable to conduct a proper canine sniff on the highway. To conduct a proper sniff, the truck had to be moved off the highway. The additional detention needed to accomplish this move must be justified by a reasonable suspicion.

After reviewing the testimony and the evidence in this case, the Court is convinced that Lt. Jackson had a reasonable suspicion sufficient to permit him to detain the truck, move it a short distance off the highway, and subject it to a brief sniff by a canine. Lt. Jackson was aware of and observed the following factors:

1. From his training and experience, Lt. Jackson was aware that the gas tanks of Dodge trucks were often used to conceal contraband.

2. The truck's bumper/tailgate and license plate cover appeared to be out of alignment and there was no evidence the truck had been in an accident.

3. A gasoline odor was emanating from the truck.

4. Neither the driver nor the passenger owned the truck, which was registered to an Austin, Texas resident.

5. The truck was less than six months old and had 20,000 miles on it.

6. The truck was traveling on I-44, a known drug courier route.

7. Both the driver and the passenger were Mexican nationals who could not speak English and who did not have in their possession visas permitting them to be where they were and claimed to have been.

The Court finds that these factors, listed in order of descending relevance, taken in the aggregate provided Lt. Jackson, a trained law-enforcement officer, with a reasonable suspicion to expect that the truck was involved in a violation of local, state or federal drug laws.

As with any investigatory detention based on reasonable suspicion, a detention for a canine sniff must last no longer than necessary to call a dog to the scene and quickly confirm or dispel the reasonable suspicion. See United States v. Place, 462 U.S. 696, 709-710, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). Lt. Jackson requested a canine unit and Officer

LeMaster was dispatched. Officer LeMaster arrived at the first location and quickly determined that the truck needed to be moved off the highway. The Court finds that Officer LeMaster's safety concerns to be credible and legitimate. The truck was moved to the second location and the exterior of the truck was immediately subjected to a canine sniff. All of this occurred within 30-35 minutes. The Court finds that under the circumstances of this case, a 30-35 minute detention to confirm or dispel Lt. Jackson's reasonable suspicion was not unreasonable. See United States v. Brown, 24 F.3d 1223, 1226 (10th Cir.1994) (holding that a 30 minute detention based on reasonable suspicion was not a per se unreasonable amount of time to wait for a canine sniff). The total detention from initial stop to canine sniff was also slightly less than an hour. This also is not an unreasonable amount of time given the circumstances of this case. See, e.g., Place, 462 U.S. at 709-710, 103 S.Ct. 2637 (finding a 90 minute investigative detention to be unreasonable).[13]

Law-enforcement officers may conduct warrantless searches of vehicles once they have probable cause to believe

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13. Canine sniffs of a vehicle are not searches within the meaning of the Fourth Amendment if the sniff is carried out while the vehicle is being lawfully detained. Thus, a particularized showing of a reasonable suspicion of drug-related criminal activity is not required. This is true even if the vehicle is being detained for reasons wholly unrelated to drug-related activity. United States v. Morales-Zamora, 914 F.2d 200 (10th Cir.1990). Nevertheless, the Court has required a reasonable suspicion of drug-related criminal activity in this case not to support a canine sniff, but because the length of the detention had to be expanded beyond what would have been reasonable in light of the reasons justifying the initial stop (i.e., unsafe lane changes).

that the vehicle contains drugs. This is true even if there are no exigent circumstances and even if the officer has time and an opportunity to obtain a warrant. United States v. Ludwig, 10 F.3d 1523, 1528 (10th Cir.1993). A positive alert from a trained drug-sniffing canine, without more, provides law-enforcement officers with probable cause to search a vehicle for drugs. A positive canine alert is itself reliable enough to provide a fair probability that contraband may be found in the vehicle. Id. at 1527 (citing several cases). Officer LeMaster's dog alerted on the exterior door seam on the passenger side of the truck. This positive alert provided Officer LeMaster and Lt. Jackson with probable cause to conduct a warrantless search of the truck, including a search of the interior of the truck with the dog.

During the comprehensive search of the truck, the canine alerted on the interior of the truck. Lt. Jackson and Officer LeMaster also smelled a stronger odor of gasoline and they noticed (1) the straps supporting the truck's gas tank had been moved, (2) one of the gas tank's yellow carrying straps was broken, (3) gas was leaking down the side of the gas tank, and (4) various tool markings on the underside of the truck.[14] Tapping on the gas tank with a nightstick also suggested that something was in the truck's gas tank. These facts, together with Lt. Jackson's observations while on the

14. Much of what the Lt. Jackson and Officer LeMaster saw was arguably within plain view on the underside of the truck, and looking at items in plain view is not a search. See, e.g., United States v. Rascon-Ortiz, 994 F.2d 749, 754 (10th Cir.1993); and United States v. Gonzalez-Acosta, 989 F.2d 384, 387-388 (10th Cir.1993). The Court need not, however, decide this issue because the Court has determined that Lt. Jackson and Officer LeMaster had probable cause to conduct a thorough search of the truck.

highway, provided Lt. Jackson with probable cause to believe that contraband of some type was being hidden in the gas tank. Lt. Jackson was justified, therefore, in seizing the truck, transporting it a short distance to a garage, and removing the gas tank to determine if it in fact contained contraband.

Based on the totality of the circumstances present in this case, the Court finds that the stop and detention of Claimants and the search and seizure of the truck were not conducted in violation of the Fourth Amendment. Claimants' motion to apply the exclusionary rule and suppress certain evidence in this case is, therefore, denied.

II. THE GOVERNMENT HAS PROBABLE CAUSE TO SEEK FORFEITURE OF THE DEFENDANT CURRENCY UNDER 21 U.S.C. § 881(a)(6), BUT NOT UNDER 31 U.S.C. § 5317(c).

Section 881(a)(6) permits the Government to forfeit currency that is intended to be used to purchase a controlled dangerous substance or is proceeds from the sale of a controlled dangerous substance. Section 5317(c) permits the Government to forfeit currency if currency in excess of $10,000.00 was transported or about to be transported across a United States border without filing the International Transportation of Currency or Monetary Instrument Report ("ITCMIR") required by 31 U.S.C. § 5316 and 31 C.F.R. §§ 103.23 and 103.27.[15]

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15. Section 881 provides as follows:

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(Cont'd)

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> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter. . . .

21 U.S.C. § 881(a)(6).

Section 5317 provides as follows:

> If a report required under section 5316 with respect to any monetary instrument is not filed (or if filed, contains a material omission or misstatement of fact), the instrument and any interest in property, including a deposit in a financial institution, traceable to such instrument may be seized and forfeited to the United States Government. . . . A monetary instrument transported by . . . messenger, or bailee is being transported under this subsection from the time the instrument is delivered to the messenger, or bailee through the time it is delivered to the . . . intended recipient, of agent of the . . . intended recipient without being transported further in, or taken out of, the United States.

31 U.S.C. § 5317(c).

Section 5316 provides as follows:

> (a) [A] person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly —

(Cont'd)

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(Cont'd)

(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time —

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the United States from or through a place outside the United States; or

(2) receives monetary instruments of more than $10,000 at one time transported into the United States from or through a place outside the United States.

(b) A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes. The report shall contain the following information to the extent the Secretary prescribes:

(1) the legal capacity in which the person filing the report is acting.

(2) the origin, destination, and route of the monetary instruments.

(3) when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person transporting the instruments personally is not going to use them, the identity of the person

(Cont'd)

*Appendix B*

The burden of proof in this case is allocated pursuant to 19 U.S.C. § 1615. Section 1615 states that in forfeiture actions "the burden of proof shall lie upon [the] claimant . . . [p]rovided, [t]hat probable cause shall be first shown for the institution of such suit or action, to be judged of by the court. . . ." Id.

> The test for determining probable cause for forfeiture purposes is the same as applies in arrests, searches and seizures. Accordingly, the government must demonstrate a reasonable ground for belief of guilt supported by less than prima facie proof, but more than mere suspicion. 'Circumstantial evidence of drug transactions may support the establishment of probable cause.'

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(Cont'd)

> that gave the instruments to the person transporting them, the identity of the person who is to receive them, or both.
>
> (4) the amount and kind of monetary instruments transported.
>
> (5) additional information.

31 U.S.C. § 5316(a) and (b). See also 31 C.F.R. §§ 103.11, 103.3, 103.27 and 103.48. Claimants have stipulated that the Defendant currency is a "monetary instrument" as that term is defined in 31 U.S.C. § 5312(a)(3). Section 5312, 5316 and 5317 are part of the Currency and Foreign Transactions Reporting Act ("CFTRA"). The report required by § 5315(b) is known as an International Transportation of Currency or Monetary Instrument Report ("ITCMIR").

> However, the presence or absence of any single factor is not dispositive. Once probable cause for forfeiture has been established, claimants may recover the defendant property only by establishing a defense to forfeiture by a preponderance of the evidence.

United States v. $149,442.43 in U.S. Currency, 965 F.2d 868, 876-877 (10th Cir.1992) (internal citations and footnotes omitted). The Government must, therefore, demonstrate to the Court's satisfaction that the Government has probable cause to believe that the defendant currency is subject to forfeiture under 21 U.S.C. § 881(a)(6) and 31 U.S.C. § 5317(c).

A. PROBABLE CAUSE TO FORFEIT UNDER 31 U.S.C. § 5317(c).

The Government's amended complaint alleges that the defendant currency "was transported to a place in the United States from or through a place outside the United States without the filing of a report pursuant to 31 U.S.C. § 5316(b)." [Doc. No. 68, p. 2, ¶ 4]. Neither the Government's Trial Brief, filed before the evidentiary hearing, nor its Brief in Support of a Finding of Probable Cause, filed after the evidentiary hearing, address why the Court should find that the Government has probable cause to believe that the defendant currency was transported from a place outside the United States to a place inside the United States. [Doc. Nos. 90 and 99]. The Government presented no evidence at the evidentiary hearing which would establish that the defendant currency was ever in Mexico or any

country other than the United States. The Court finds that the Government has failed to establish that it has probable cause to forfeit the defendant currency under 31 U.S.C. § 5317(c). That portion of the Government's Amended Complaint seeking forfeiture of the defendant currency under § 5317(c) is, therefore, dismissed with prejudice.

B. PROBABLE CAUSE TO FORFEIT UNDER 21 U.S.C. § 881(a)(6).

The Government's amended complaint alleges that the defendant currency "was furnished, or intended to be furnished, in exchange for a controlled substance, or is proceeds traceable to such an exchange, or is money used, or intended to be used, to facilitate a violation of Title 21 of the United States Code. . . ." [Doc. No. 68, p. 2, ¶ 4]. The Government has offered no evidence to establish that the defendant currency was "furnished or [was] intended to be furnished" in exchange for drugs. The Government has also offered no evidence that the defendant currency was "used or intended to be used" to violate a specific provision of Title 21. The Government only offered evidence that the defendant currency is "proceeds traceable" to the sale of drugs. That portion of the Government's Amended Complaint seeking forfeiture of the defendant currency under § 881(a)(6) as money that was to be furnished for drugs or money that was to be used to violate a specific section of Title 21 is, therefore, dismissed with prejudice. The Government may forfeit the defendant currency only as proceeds traceable to the sale of drugs.

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The Court has reviewed the numerous cases cited by the parties regarding the probable cause necessary to forfeit currency as drug proceeds under § 881(a)(6). The Government has introduced sufficient evidence to establish probable cause to believe that the defendant currency is the proceeds of the sale of a controlled dangerous substance. While certain factors in isolation may only have marginal relevance, no one factor controls. The Court is convinced that in the aggregate the following factors are sufficient to sustain the Government's burden and require Claimants' to come forward and demonstrate that the defendant currency is not the proceeds of an illegal drug transaction:

> 1. The money was hidden in the gas tank of a Dodge pickup truck. Dodge pickup trucks are frequently used by drug traffickers because the large gas tank and gas tank openings make it easy to conceal drugs and drug proceeds. Gas tanks are often used to conceal drug proceeds because the gas and the tank help mask the odor of drugs. See testimony of Lt. Jackson, Michael H. Woods, a Sargent with the Missouri Highway patrol who testified for the Government, and James E. Judd.
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> 2. Mexico is a known transit zone for drugs headed to the United States from Central and South American countries and for drug proceeds headed to Central and South American countries from the United States. See testimony of James E. Judd.[16]

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16. Agent Judd is an ex-FBI and Border Patrol agent and he is currently an assistant to the Drug Czar. Agent Judd currently advises (Cont'd)

3. Several characteristics of the drug courier profile are present. See testimony of Lt. Jackson, Agent Judd and Sgt. Woods.

a. The truck was being driven by two Mexican nationals who did not have proper visas and who did not own the truck. The owner of the truck was not present and Claimants disavowed any knowledge of the currency when it was found in the truck's gas tank.

b. The truck was headed south on Interstate 44 from an interior state to Mexico, a border state. I-44 is known to law-enforcement agencies as a drug pipeline or drug courier route. See testimony of Sgt. Woods.

c. The driver and passenger of the truck had been on a long trip allegedly for recreation, but only had a brief stay at their claimed destination before beginning the return trip.

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(Cont'd)
the President on better and more efficient methods to interdict drugs coming into the United States and drug proceeds leaving the United States. Agent Judd has been involved with the investigation of drug-related offenses for most of his 25 year career. Agent Judd was qualified as an expert on drug-related matters under Fed.R.Evid. 702 and the Court finds his testimony credible.

d. Neither the driver nor the passenger had criminal records.

e. The truck was relatively new with high mileage.

f. There is some evidence to suggest that the bed of the truck had been on and off several times.

g. It is common for there to be two passengers so that one can driver and one can sleep while the other is driving. This permits long distances to be covered in a short time.

4. The large amount of currency involved.

5. The fact that Officer LeMaster's drug-sniffing canine hit on the exterior and interior of the truck, indicating the presence of drugs in the truck at some time.

6. The unique packaging of the currency — triple-wrapped in cellophane, heat-sealed and vacuum-packed. Agent Judd testified credibly that out of the numerous currency seizures he has made, assisted or witnessed, the only currency he has seen packaged the way the defendant currency was packaged is currency that had some connection to drugs. Agent Judd testified that he had never seen currency packaged the same as

> the defendant currency that was not connected to drugs. According to Agent Judd, currency is packed the way the defendant currency was packaged for two reasons: two mask the odor of drugs and to prevent the cash from mildewing as the cash makes its way through the jungles of Mexico and Central and South America.

See also testimony of Sgt. Woods.

## CONCLUSION

Claimants' request to suppress certain evidence as the fruit of a stop, detention, search or seizure in violation of the Fourth Amendment to the United States Constitution is denied. The Court finds that based on the totality of the circumstances, the stop, detentions, searches and seizures in this case were valid under the Fourth Amendment. The Government has failed to establish that it has probable cause to forfeit the defendant currency under 31 U.S.C. § 5317(c) as currency that crossed from Mexico into the United States without the filing of an ITCMIR. The Government has failed to establish probable cause to forfeit the defendant currency under 21 U.S.C. § 881(a)(6) as currency that was "furnished or [was] intended to be furnished" in exchange for drugs. The Government has failed to establish probable cause to forfeit the defendant currency under 21 U.S.C. § 881(a)(6) as currency "used or intended to be used" to violate a specific provision of Title 21. Those portions of the Government's amended complaint are, therefore, dismissed with prejudice. The Government has established probable cause to forfeit the defendant currency under 21 U.S.C. § 881(a)(6) as currency that is proceeds traceable to a sale of drugs.

*Appendix B*

The Court will conduct a jury trial to allow Claimants to establish by a preponderance of the evidence that the defendant currency is not subject to forfeiture under 21 U.S.C. § 881(a)(6) as the proceeds of a drug transaction. Trial will begin July 20, 1998 at 9:30 a.m. If Claimants intend to call Maria Elena Navarette De Garza as a witness at trial, they must cooperate with the Government in producing her for a deposition to be taken prior to June 27, 1998. A pre-trial conference will be held on July 7, 1998 at 10:30 a.m. Proposed jury instructions and proposed voir dire shall be submitted no later than June 29, 1998.

IT IS SO ORDERED.